

Brown



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ingram Barge Company

File: B-230672

Date: June 28, 1988

DIGEST

Protest that contracting agency failed to consider findings in civil action indicating company's wrongdoing to determine firm's responsibility is denied where contracting agency considered criminal conviction concerning the same matters as involved in the civil proceeding and based its affirmative determination of responsibility on a settlement agreement by which the firm took corrective action to remedy its past misconduct.

DECISION

Ingram Barge Company protests the award by the Military Traffic Management Command (MTMC), to Port Arthur Towing Company (PATCO) under a request for tenders to move and/or store aviation fuel from origin ports throughout the Gulf Coast for a 12-month period with an option to renew for 30 day increments not to exceed 1 year. Ingram protests the contracting officer's affirmative determination of responsibility of PATCO.

We deny the protest.

MTMC issued the request for tenders on January 20, 1988. Ingram and PATCO submitted rate tenders by the tender opening date of February 23. The request provided that award would be made to "the responsive, responsible carrier whose offer conforms to the tender and is most advantageous to the government, provided that an affirmative determination of responsibility can be made" The tender further indicated that the tenders would be awarded based on low cost. The tender also provided that equipment would have to be available on a 24 hour per day, 7 day per week basis, and provided a tender format providing for identification of the specific barges offered and insertion of

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monthly charges for the service. MTMC determined that PATCO submitted the lower priced, responsive offer and found PATCO to be responsible to meet the requirements of the tender. MTMC informed PATCO on March 4 that its tender had been accepted and this protest followed on March 10.

Specifically, Ingram argues that the contracting officer's affirmative determination of responsibility was made in bad faith because the agency allegedly failed to properly consider criminal indictments of PATCO and its management and a civil action for damages arising from PATCO's criminal conduct which raise questions concerning the integrity and responsibility of PATCO and its officers. MTMC asserts that this acquisition is governed by the Transportation Act of 1940, 49 U.S.C. § 10721 (1982), which exempts transportation services from the procurement statutes and that, in any event, its finding that PATCO was responsible was not made in bad faith. Whether or not the agency's actions are covered by the Transportation Act of 1940 or the procurement statutes, the issue clearly is whether the agency's determination to find PATCO responsible constituted bad faith. For the reasons stated below, we find Ingram's arguments concerning agency bad faith to be without merit.

The protester recognizes that under our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(3), our Office will not review an affirmative determination of responsibility in the absence of a showing of possible fraud or bad faith by the procuring officials or that definitive responsibility criteria in the solicitation may not have been met. The protester contends that the agency's finding that PATCO is responsible was made in bad faith stemming from the wanton and flagrant disregard of the agency's duty to investigate PATCO's responsibility.

Initially, we note that the determination of responsibility here was made on the basis of the elements of performance under the carrier performance program, Army Regulations 55-355, 42-5(k) 2-4,13, July 31, 1986, which provides for disciplinary administrative actions including a finding of nonresponsibility for carriers which do not satisfy minimum levels of performance. As is pertinent here, the regulations also specify agency consideration of a conviction for criminal offense as an incident to obtaining or attempting to obtain a contract, conviction of specified crimes or any offense indicating a "lack of business integrity or business honesty" affecting the question of responsibility as a government carrier, and any other cause or condition of a serious or compelling nature affecting responsibility.

The record shows that on May 7, 1986, the MTMC suspended PATCO and numerous individuals connected with PATCO based on criminal indictments. On October 13, PATCO and these

individuals were proposed for debarment based upon guilty pleas in the criminal proceedings. While certain individuals were debarred, PATCO and the MTMC arrived at a settlement agreement dated January 21, 1988, in which the company was not debarred in exchange for the purging of certain convicted individuals from the company and the establishment of internal standards of conduct and a code of ethics.

While the criminal matters were pending, commercial customers of PATCO initiated a civil action against PATCO and its management seeking damages under the Racketeer Influenced and Corrupt Organization (RICO) Act, 18 U.S.C. § 1962 (1982). The factual bases for this suit are the same as those underlying the criminal indictments. On August 7, 1987, a preliminary injunction was issued against the wasting or secreting of assets by the defendants pending the cases completion. See Dixie Carriers, Inc., et al. v. Channel Fueling Service, Inc., et al., Civil Action No. B-86-1191-CA (D. Tex.). The court, among other things, found PATCO knowingly had not delivered fuel it sold and had also stolen fuel.

The request for tenders was issued on January 20, 1988, and award was made on March 4. MTMC indicates it made the determination of responsibility with knowledge of the debarment agreement, but apparently was unaware of the civil action preliminary injunction.

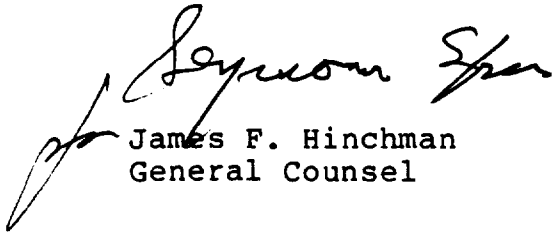
Ingram argues that the responsibility determination was in bad faith because the agency failed to investigate the facts, specifically to discover the civil suit and findings made by the court.

Procurement officials are presumed to act in good faith, and in order to show otherwise, a protester must submit virtually irrefutable proof that they had a specific and malicious intent to harm the protester. See J. F. Barton Contracting Co., B-210663, Feb. 22, 1983, 83-1 CPD ¶ 177.

We find that the protester has not shown bad faith. Here, the agency based its finding on the settlement agreement in which PATCO purged its management of the convicted individuals and agreed to take other corrective action. Furthermore, as conceded by Ingram, PATCO's wrongful conduct that forms the basis of the civil action arises from the facts underlying the criminal case and thus, in effect, was considered by MTMC in agreeing to the settlement. Thus MTMC essentially was aware of the basic facts concerning PATCO's conduct when it found PATCO responsible. Moreover, the agency states that it has reviewed the civil court findings and advises that knowledge of the civil case would not have

changed its determination. While Ingram may reasonably disagree with the agency's determination, we have no basis to find bad faith or fraud on the agency's part.

We deny the protest.

A handwritten signature in cursive script, appearing to read "James F. Hinchman".

James F. Hinchman
General Counsel